LIBRARY
SUPREME COURT, U. S.

FILED
SEP 12 1967
JOHN F. DAVIS, CLERK

NO. 481

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

ELLIS CARP, ET AL.,

Appellants

vs.

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY, ET AL.,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

MOTION TO DISMISS OR AFFIRM

CRAWFORD C. MARTIN
Attorney General of Texas

GEORGE M. COWDEN
First Assistant Attorney General

A. J. CARUBBI, JR.
Staff Legal Assistant

J. C. DAVIS
Assistant Attorney General

JOHN REEVES
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711

WILL GARWOOD
Special Assistant Attorney General

TOM GEE
Special Assistant Attorney General
Austin National Bank Bldg.
Austin, Texas

Attorneys for Appellee,
Texas State Board of
Examiners in Optometry

INDEX

	Page
STATEMENT OF THE CASE	1
JURISDICTION	2
ARGUMENT	2
CONCLUSION	12
SERVICE	13

CITATIONS

Berea College v. Kentucky, 211 U.S. 45, 53	2
Black v. Cutter Laboratories, 351 U.S. 292, 298	2
Dixon v. Duffy, 342 U.S. 33	2
Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164	2
Fox Corp. v. Muller, 296 U.S. 207, 210	2
French v. Hopkins, 124 U.S. 524	3
Gibson v. Mississippi, 162 U.S. 565	3
Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 at 428	3, 5
Herb v. Pitcairn, 324 U.S. 117, 125	2
Iowa Cent. R. Co. v. Iowa, 160 U.S. 389	3
Klinger v. State of Missouri, 13 Wall. (U.S.) 257, 263	2
Lerner v. Casey, 357 U.S. 468	3
Murdock v. Memphis, 20 Wall. (U.S.) 590, 636	2
Speiser v. Randall, 357 U.S. 513	3
Texas State Board of Examiners in Optometry v. Carp, 388 S.W.2d 409 (Tex. Sup. Ct. 1965)	5
Williamson v. Lee Optical of Oklahoma, 348 U.S. 483	3, 5, 11
Wood v. Brady, 150 U.S. 18	3
Young v. Ragen, 337 U.S. 325	2

OTHER AUTHORITIES:

Articles 4552—4566-1, Texas Revised Civil Statutes, 1925, as amended	4

NO. ———

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

ELLIS CARP, ET AL.,

Appellants

vs.

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY, ET AL.,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellee, Texas State Board of Examiners in Optometry, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves that this case be dismissed on the grounds that the case does not present a substantial federal question or in the alternative that the final judgment of the Supreme Court of Texas herein be affirmed or if the Jurisdictional Statement be treated as a petition for certiorari that the writ be denied. There are no substantial Federal questions in this case.

STATEMENT OF THE CASE

This action is an appeal by Appellants seeking a judgment declaring invalid the Professional Responsibility Rule adopted by the Texas State Board of Examiners in Optometry on December 21, 1959.

The facts of this case are stated in the opinion of the Supreme Court of the State of Texas which opinion, together with the dissenting opinion, is set forth in the appendix to the Appellants' Jurisdictional Statement at pp. 1a-26a and is reported at 412 S.W.2d 307 and in the opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, which opinion is set forth in the appendix of the Jurisdictional Statement at pp. 27a-38a and is reported at 401 S.W.2d 639.

JURISDICTION

It is questioned by Appellee, Texas State Board of Examiners in Optometry, that any substantial federal question is presented for adjudication by the Supreme Court of the United States. In the alternative, if the Jurisdictional Statement be treated as a petition for certiorari, Appellee contends that the writ should be denied. There are no substantial federal questions in this case.

ARGUMENT

The Supreme Court of the United States will not review judgments of state courts that rest on adequate and independent state grounds. *Black v. Cutter Laboratories*, 351 U.S. 292, 298; *Herb v. Pitcairn*, 324 U.S. 117, 125; *Klinger v. State of Missouri*, 13 Wall. (U.S.) 257, 263; *Murdock v. Memphis*, 20 Wall. (U.S.) 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164; *Fox Corp. v. Muller*, 296 U.S. 207, 210; *Dixon v. Duffy*, 342 U.S. 33; *Young v. Ragen*, 337 U.S. 325. Applying this principle to the instant case, the judgment of the Supreme Court of Texas rests on adequate and independent state grounds in that the

Supreme Court of Texas has merely passed upon the issue of whether a state administrative body, the Texas State Board of Examiners in Optometry, exceeded its statutory powers in promulgating the rule involved in this case pursuant to the statutes of the State of Texas.

The cases are clear that a decision of a state court resting on grounds of state procedure does not present a federal question. *French v. Hopkins*, 124 U.S. 524; *Iowa Cent. R. Co. v. Iowa*, 160 U.S. 389; *Gibson v. Mississippi*, 162 U.S. 565; *Wood v. Brady*, 150 U.S. 18. The cases are also equally clear that the construction of state laws is the exclusive responsibility of state courts. *Speiser v. Randall*, 357 U.S. 513; *Lerner v. Casey*, 357 U.S. 468. Applying the foregoing principles to the instant case, the Appellee respectfully submits that there is no substantial federal question presented. The judgment and decree of the Supreme Court of Texas rested on adequate and independent state grounds and therefore the questions here submitted are so unsubstantial as not to warrant further argument. The argument of Appellants has been rejected by this Court in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483; *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 at 428.

Appellants assert in their Jurisdictional Statement that the Professional Responsibility Rule of the Texas State Board of Examiners in Optometry which prohibits kickbacks, fee splitting, assumed names, and holding out of practitioners names on offices where they do not customarily practice, is invalid on grounds of due process and the Sherman Act. Each of these arguments is based on the erroneous premise that the Rule was established by private action and not by

official action of an administrative agency of the State of Texas. The record in this case does not support the premise. This Appellee, the Texas State Board of Examiners in Optometry, is an official administrative agency of the State of Texas established by statute in 1921 and performs its official duties pursuant to Articles 4552-4566-1, Texas Revised Civil Statutes, 1925, as amended, said Articles being chapter 10 of Title 71 of the Revised Civil Statutes of Texas, 1925, as amended, and the issue in this case as stated by the Supreme Court of Texas is whether the Board exceeded such statutory powers in promulgating the Professional Responsibility Rule. The Rule itself, which was adopted by the Texas State Board of Examiners in Optometry December 21, 1959, is set out in the record as Defendants' Exhibit 56 (S.F. 2843). Appellant N. J. Rogers signed the minutes reflecting the Board's action adopting the Rule in his official capacity as Vice President. It is also reflected in the record that numerous opportunities were given Appellants to voice their views during the prolonged consideration given this Rule by the Board (from September, 1954, through December 21, 1959). At the meeting of the Board on December 21, 1959, prior to taking its official action of adopting the Rule, the Board heard lengthy arguments by Messrs. Keith and Bergman against the adoption of the Rule, appearing before the Board on behalf of Appellants. These matters are all reflected by Defendants' Exhibit 56 and pages 421-26, 422, 815, and 2110-2113 of the Statement of Facts.

There are no questions of substantive due process in this case. Appellants licenses and practice are and always have been held and exercised subject to the police power of the State. As this Court recently ob-

served in *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 at 428, state measures in this precise area:

> ". . . falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. *Williamson v. Lee Optical Co.*, 348 U.S. 483."

The vast majority of the states have rules or statutes similar to this Rule (S.F. 2438-2683), and a host of state decisions referred to in the opinion of the Supreme Court of Texas affirmed that they are proper. 412 S.W.2d at 312.

At the end of an extremely lengthy trial of this plainly substantial-evidence case to the jury demanded by Appellants, that jury predictably hung. The extraordinary writ of mandamus was granted by the Texas Supreme Court, directing the trial court to enter judgment one way or the other. *Texas State Board of Examiners in Optometry v. Carp*, 388 S.W.2d 409 (Tex. Sup.Ct. 1965). Thereafter, judgment was rendered for Appellees.

Appellants chose the route of appeal to the Dallas Court of Civil Appeals, rather than direct to the Supreme Court of Texas. Rule 499-a, Texas Rules of Civil Procedure. In the Dallas Court of Civil Appeals Appellants lodged eight points of error. That court ruled in Appellants' favor on their first two points, which asserted only that the rule was beyond the Optometry Board's delegated authority under the Texas statutes involved. Articles 4556 and 4563, Revised Civil Statutes of Texas, 1925, as amended, granting the board rule-making power and defining certain offenses

of optometry practictioners. Appellants' other six points were expressly overruled; these contained the sole references to the issues sought to be raised here. The Dallas Court of Civil Appeals rendered judgment in favor of Appellants. Appellees then sought discretionary review in the Supreme Court of Texas, and there prevailed. In that court, Appellants abandoned and withdrew the sole element of any point here raised which they had made below—a complaint that the Rule-making procedure delegated the Board's rule-making power to "outsiders."

Rehearing was denied on March 29, 1965, and on April 4 the Texas Supreme Court granted Appellants a stay of mandate to June 27 to convenience them in this appeal. Sometime in middle June Appellants sought of Mr. Justice Black a further stay of enforcement of the Texas Supreme Court's judgment, which was denied on June 22, 1967. On June 26, 1967, a second attempt at a stay by Appellants was denied by Mr. Justice White, and on the following days the mandate of the Supreme Court of Texas issued.

Neither the Sherman Act nor the Supremacy Clause was referred to in the trial pleading, nor cited in any brief filed by Appellants in any State court herein, either in the mandamus action or in this case. In fact, Appellants affirmatively advised the Texas Supreme Court in the mandamus action that the conspiracy and restraint-of-trade complaints of the trial pleadings were complaints under Texas statutes stating: "What, in legal effect, was charged by the individual respondents in their pleadings was an actionable conspiracy under the Anti-Trust Laws of the State.," page 15 of Brief of Respondents, Ellis Carp, S. J. Rogers and N. J. Rogers, in the mandamus action.

The above appears at the commencement of thirteen pages of argument citing and discussing the Texas Constitution and Texas anti-trust laws and cases thereon. but containing not a reference anywhere to the Sherman Act or the Supremacy Clause. Having thus said nothing whatever about the United States anti-trust laws or the Supremacy Clause until Appellants got to this court and having briefed and argued the Texas Constitution and anti-trust statutes, it cannot now be asserted by Appellants that what they meant all along was the Sherman Act and that they raised and preserved it at every stage below (J.S. pp. 10-13).

Furthermore, during the trial Appellant N. J. Rogers testified as follows:

"Q All right. Doctor, let me ask you, do you feel that the members of the State Board, with whom you serve, and who elected you vice-president a while back, hold their views on this question of assumed name sincerely?

"A I would have to say that I would presume they did; I don't know any more than I know about any other single man, but I would presume they would fall in that same category of men that would hold that opinion sincerely.

"Q All right, sir, and you would be prepared to concede that their views on the trade name practice are, as far as you know, sincerely held?

"A Yes, I would certainly concede that.

"Q So that it may well be, and insofar as you know, is that the other members of the State Board who voted for the Professional Responsibility Rule forbidding trade name

practice did so because they sincerely thought it was the best thing for the people of Texas and for the profession of optometry, do you not, Doctor?

"A Yes." (S.F. 466-468).

Concerning the merits of the Professional Responsibility Rule, it is submitted that the Supreme Court of Texas accurately observed in its opinion below: "The necessity for such a rule was demonstrated by—the record which abounds with evidence of the specific evils the rule was designed to correct." 412 S.W.2d 307. Many illustrations are contained in the record in this case showing the accuracy of the above finding by the Texas Supreme Court in its opinion below. These illustrations are contained on pages 12-42 of our Application for Writ of Error filed in the Supreme Court of Texas in this case and need not be repeated at length here. However, we believe that a few references to the Statement of Facts is warranted.

Appellant, N. J. Rogers admitted that "there are arguments both ways" on the trade-name practice, a very significant admission indeed in a substantial evidence case (S.F. 466).

Evidence was introduced of the Appellants' Rogers consistent advertising policy of representing that one Texas State Optical examination reveals all about one's eyes, including specifically the presence or absence of glaucoma and other eye conditions causing blindness if left untreated, though N. J. Rogers himself testified that no one examination could detect glaucoma. (S.F. 1877-8, 1881-2, 378-80, 1921-2). The record also contains Dr. N. J. Rogers' memorandum

on examining children's eyes, circulated to his employed optometrists in 1959 and 1960, advising them to use the opthalmometer "since this is an impressive instrument" and ". . . to prescribe a correction which the patient can wear as much as possible so that the parent will not feel that the child could probably get along without them since the child wears them so little of the time." (S.F. 2293-99). At trial N. J. Rogers testified he had never seen some of his offices (S.F. 1876), did not know for sure how many were in the city where the case was tried (S.F. 333) or who serviced a particular office there (S.F. 495), and admitted that the equipment in his offices was not uniform (S.F. 39, 40); yet the keystone of his advertising policy was the virtue of "a scientific TSO eye examination" (S.F. 1886-8) at which "[I]f a defect or disease exists in the eye, the experienced Doctor of Optometry at TSO will detect it. Satisfaction guaranteed." (S.F. 1881-2). A trade name makes such practice possible. Testimony to this effect is in the record—that these and like practices are inherent in the trade-name practice and appear wherever it is allowed to go on. Dr. Judd Chapman, President of American Optometric Association (S.F. 690-1); Dr. Henry Hofstetter, O.D., Ph.D., (S.F. 751-2, 751-5, 775); Dr. Oscar Marchman, M.D. (S.F. 272-275); and Dr. E. A. Templeton, a former employee of the Drs. Rogers, whose entire testimony, commencing at S.F. 2283 and ending at S.F. 2297, is highly significant.

Similarly, the record reflects frequent telephone listings and office displays falsely indicating to the public that one or more of Appellants Rogers regularly and personally examined patients at various particular offices (just like the employed optometrist there

full time) when in fact Appellants Rogers had never been inside of some of these offices for years (S.F. 477-483, 1900-1904, 2197-2199; Plaintiffs' Ex. 28, Defendants' Ex. 6).

For his part Dr. Ellis Carp, the Court's other Appellant, was at the time of trial herein practicing in Wichita Falls, Texas, in three different offices with three different names, all within a two-block radius of each other—Mast Optical, Luck Optical and Lee Optical—which he held out as totally distinct, selling the same glasses as Mast glasses at $14.50, Luck glasses for $14.90 and Lee glasses for $12.90—while advertising on behalf of Lee "Why pay $14.50, $16.50, $20.00 or even more for glasses?" (S.F. 1706). Appellant Carp admitted, of course, that the supervision, optical materials, equipment, and often even the examining optometrists were all the same—the only difference was name and price. (S.F. 1631-34). A similar situation existed in Dr. Carp's El Paso operation, the names there being Luck, Mesa and Lee (S.F. 1637-43, 1648, 1650-1). In Texas Dr. Carp has used, and discarded the names of Plains Optical, Amarillo Optical, Lubbock Optical, Panhandle Optical, Mission Optical, Douglas Optical, Shannon Optical, and Pearl Optical. (S.F. 1658-1660, 1573-5). A final note which shows a vice inherent in trade-name practice of a profession: about the time of trial there was practicing in the Dallas-Fort Worth area one Dr. L. H. Luck. Dr. Carp had bought offices from him and was practicing there in the name of Dr. Luck (or Luck One Price Optical). (S.F. 1597-8, 1649, 1657). The Appellants Rogers had done likewise (S.F. 376, 458). And so during recent years in that area there have been not less than three different groups practicing optometry in the Luck

name, at least two at the same time (S.F. 1649, 1657) and perhaps all three: all of the Court's appellants and Dr. Luck himself.

We feel that the above references to the Statement of Facts is sufficient to show that the evidence demonstrates the evils found to be inherent in trade-name practice. The Professional Responsibility Rule adopted by the Texas State Board of Examiners in Optometry is, therefore, in the precise area held by this Court to be subject to the police power of the State. *Williamson v. Lee Optical Company,* 348 U.S. 483.

The Supreme Court of Texas has determined that the adoption of the Professional Responsibility Rule by the Texas State Board of Examiners in Optometry on December 21, 1959, constituted a valid exercise of its statutory powers under state law. Thus, the decision by the Supreme Court of Texas rested on adequate and independent state grounds and, therefore, the questions here submitted are so unsubstantial as not to warrant further argument.

CONCLUSION

We respectfully submit, therefore, that Appellants have not presented any substantial federal question for adjudication of the Supreme Court of the United States. The appeal should be dismissed or the judgment and decree of the Supreme Court of Texas should be affirmed. In the alternative, if the Jurisdictional Statement be treated as a petition for certiorari, the writ should be denied.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

GEORGE M. COWDEN
First Assistant Attorney General

A. J. CARUBBI, JR.
Staff Legal Assistant

J. C. DAVIS
Assistant Attorney General

JOHN REEVES
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711

WILL GARWOOD
Special Assistant Attorney General

TOM GEE
Special Assistant Attorney General
Austin National Bank Bldg.
Austin, Texas

Attorneys for Appellee,
Texas State Board of
Examiners in Optometry

SERVICE

I, George M. Cowden, First Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Motion has been forwarded by United States Mail, First Class, postage pre-paid, to Appellants' attorneys, Thurman Arnold, Robert E. Herzstein, Brooksley Landau, 1229 - 19th Street, N.W., Washington, D. C.; Douglas E. Bergman, 1512 Mercantile Bank Building, Dallas, Texas; Quentin Keith, San Jacinto Building, Beaumont, Texas; Arnold & Porter, 1229 - 19th Street, N.W., Washington, D.C.; Price Daniel, Brown Building, Austin, Texas; Jake Jacobsen, Westgate Building, Austin, Texas.

GEORGE M. COWDEN